

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36623

STATE OF IDAHO,)	2010 Unpublished Opinion No. 391
)	
Plaintiff-Respondent,)	Filed: March 22, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
TRAVIS LEE KERZMAN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Joel E. Tingey, District Judge.

Order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth Ann Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

Before LANSING, Chief Judge; GUTIERREZ, Judge;
and GRATTON, Judge

PER CURIAM

Travis Lee Kerzman pled guilty to injury to a child. Idaho Code § 18-1501. The district court sentenced Kerzman to a unified sentence of ten years with two years determinate. The district court suspended the sentence and placed Kerzman on supervised probation for six years. Thereafter Kerzman violated the terms of his probation and the district court continued supervised probation with additional conditions. Kerzman again violated the terms of his probation and the district court revoked his probation, ordered the underlying sentence executed, and retained jurisdiction. Following a period of retained jurisdiction, the district court relinquished jurisdiction. Kerzman filed an Idaho Criminal Rule 35 motion, which the district court denied. Kerzman appeals.

As an initial matter, the State contends that the district court did not have jurisdiction to rule on Kerzman's Rule 35 motion. Pursuant to Rule 35, the district court may reduce a sentence within 120 days after the court releases retained jurisdiction. However, a court has jurisdiction to rule on a timely-filed Rule 35 motion within a reasonable time after the expiration of the 120 days. *State v. Chapman*, 121 Idaho 351, 352, 825 P.2d 74, 75 (1992). It is the movant's responsibility to precipitate action on a Rule 35 motion or otherwise provide an adequate record and justification for the delay to avoid the trial court losing jurisdiction. *State v. Payan*, 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct. App. 1998). After the district court relinquished jurisdiction, Kerzman's counsel filed a motion for reconsideration which was, thereafter, neither supported nor ruled upon. Within the 120 days Kerzman filed his pro se Rule 35 motion.¹ Counsel was appointed and was granted a number of continuances. Kerzman filed affidavits and requested and was granted time to submit additional evidence. Counsel was allowed to withdraw, new counsel was appointed and allowed time to file additional evidence. Ultimately, the district court denied an additional motion to submit evidence and entered a written order denying the Rule 35 motion. Based upon the record and under the circumstances of this case, the delays which occurred were for proper purposes and the district court acted within a reasonable time and, therefore, had jurisdiction in ruling upon the motion.

Kerzman contends that the district court abused its discretion when it denied his Rule 35 motion. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Upon review of the record, including the new information submitted with Kerzman's Rule 35 motion, we conclude no abuse of discretion has been shown. Therefore, the district court's order denying Kerzman's Rule 35 motion is affirmed.

¹ Kerman's Rule 35 motion appears timely filed under the mailbox rule. *Hayes v. State*, 143 Idaho 88, 91, 137 P.3d 475, 478 (Ct. App. 2006).